IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY REGISTRY)

AT DAR ES SALAAM

PC CRIMINAL APPEAL NO. 12 OF 2019

(Arising from the Judgment of the District Court of Morogoro at Morogoro in Criminal Appeal No. 40 of 2018 dated 11th June, 2018 before Hon. I. Msacky, **RM**, Original Criminal Case No. 80 of 2018, Mvomero Primary Court)

MOHAMED MSHAURI ..... APPELLANT

VERSUS

GERALD AMANDI ..... RESPONDENT

JUDGMENT

07th Sept & 02nd Oct, 2020.

E. E. KAKOLAKI J

This is the second appeal by the appellant challenging the decision of Morogoro District Court dated 11/06/2018 in Criminal Appeal No. 40 of 2018 that upheld the decision of Mvomero Primary Court in Criminal Case No. 80 of 2018. He is canvassed with five grounds of appeal which I quote in verbatim:

1. The Trial Magistrate Court and first appellate District Magistrate Court grossly erred in law and fact by failure to observe that the offence of

malicious damage of property was not proved beyond reasonable doubt against the appellant.

2. The Trial Magistrate Court and first appellate District Magistrate Court erred in law and fact by failure to observe that the Ward Tribunal at Mkindo/Bungoma in Shauri No. 23 of 2017 on the 25th January 2017 helad that the land in dispute belonged to the appellant, it is the same land that forms the subject matter of the offence of malicious damage of property.
3. The Trial Magistrate Court and first appellate District Magistrate Court erred in fact and law by holding that the land belonged to the respondent while the evidence led by the appellant proved materially and cogently that the same belonged to the appellant and not the respondent.
4. The Trial Magistrate Court and first appellate District Magistrate Court erred in fact and law by failing to take judicial notice of the decision of the Ward Tribunal at Mshindo/Bungoma in Civil Case No. 23 of 2017 dated January 2018 through which the appellant was given go ahead to proceed with farming on the said land after having found the appellant to be the owner and that the Respondent did appeal against the decision of the said Ward Tribunal.
5. The Trial Magistrate Court and first appellate District Magistrate Court erred in law and fact in failing to evaluate the ingredients of the offence of malicious damage to property whereby convicting and sentencing the appellant.

The appellant is therefore praying this court to quash the conviction and set aside the sentence and the compensation order imposed to him by the court.

Briefly before the trial court the appellant was charged with the offence of Malicious Damage to Property; Contrary to Section 326(1) of the Penal Code, Chapter 16. It was alleged that, on the 16th day of March 2018, at Mkindo area within Mvomero District in Morogoro Region, the appellant using a tractor ploughed the respondent's paddy field thereby causing damages to the seedlings, all the damages valued at Tshs. 240,000/=, which act to his knowledge was contrary to the law. The appellant denied the charge raising a defence that the said paddy field/plot was his as the dispute over the disputed land was resolved in his favour before the Mkindo Land Ward Tribunal in Land Cause No. 23 of 2017. After a full trial, the trial court found him guilty of the offence charged with, convicted and sentenced him to pay a fine of Tshs. 150,000/= or serve imprisonment term of two months in default. And in addition to that, he was ordered to compensate the respondent Tshs. 240,000/= for the loss he suffered him by damaging his seedlings. Discontented the appellant unsuccessfully appealed to the District Court in Criminal Appeal No. 40 of 2018. He is now before this court for second appeal expressing his dissatisfaction through the five (5) grounds of appeal above cited.

When the appeal came for hearing both parties appeared unrepresented and agreed to dispose it by way of written submission. I am grateful to the parties as both adhered to the filing schedule orders. It is worth noting that, before lodging his appeal the appellant who by then found himself time barred

successfully sought an extension of time within which to appeal in this court vide Misc. Criminal Application No.125 of 2019. It is also noted through the appellant's grounds of appeal that his appeal is against both trial court and appellate court decision instead of being against appellate court decision only. However, guided by the principle of overriding objective which is to dispense justice timely and avoid unnecessary technicalities, I am prepared to determine the appeal on assumption that the same is against the decision of the District Court of Morogoro.

In determining the appeal and for the reasons to be disclosed soon, I have chosen to start with the last ground of appeal whereby the appellant is faulting the appellate court for failure to evaluate the ingredients of the offence of malicious damage to property. The appellant in this ground adopted his arguments in the first ground. It is his submission that, the ingredients of the offence of malicious damage to property were not proved beyond reasonable doubt. He relied on Ugandan High Court case **Sseepuuya Vincent and Another Vs. Uganda**, Criminal Appeal Case No. 18 of 2018, that quoted with approval the case of **Muwanga Angelo and Another Vs. Uganda**, Criminal Appeal No. 12 of 2009 when interpreting section 335(1) of the Ugandan Penal Code on the offence of malicious damage to property which is in parimateria with section 326(1) of the Penal Code of Tanzania. He said, in that case where the appellants were charged of malicious damage to property, the first appellant was accused of damaging the house of one Lutwama and the Court held that:

> *"...the element of wilfully and unlawfully which is one of the ingredient of malicious damage property was done away. Hence,*

the offence of malicious damage of property could not stand against the appellants."

Basing on that authority he argued, the ingredients of wilfulness and unlawfulness of the purported damage were not considered by the appellate court to satisfy itself that the offence of malicious damage to property was proved before upholding the trial court's decision. He implored the court to find that the offence was not proved beyond reasonable doubt hence allow the appeal.

The respondent on his part challenging the appeal submitted that, the appellant was correctly convicted of the offence because he had knowledge that the land he trespassed on was not his as the Mkindo Ward Tribunal in deciding on the ownership of the disputed land concluded that the appellant should proceed to use his land of 5 ¼ acres but to the contrary he trespassed to the respondent's 4 acres. He therefore invited the court to dismiss the ground for want of merit.

As alluded earlier the appellant in his submission relied on the decision of the High Court of Uganda to support his submission that the offence of Malicious Damage to Property was not proved against him. It is settled law that where there is decided cases in our jurisdiction on the subject matter to support the party's position it is discouraged to apply or rely on the foreign jurisdiction decision as that will not be binding to our courts but rather persuasive. It is from that position I do not feel obliged to follow the case cited by the appellant as there are decided cases in our jurisdiction over the proof of ingredients of the offence of malicious damage to property.

In determining this ground I find it imperative to quote the provision of section 326(1) of the Penal Code whose ingredients of offence are alleged by the appellant not to have been proved by the respondent. It provides:

> *326.-(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years.*

What constitutes the offence of malicious damage to property, **first** is the intent to commit the offence which is "*malice*" as the accused is presumed to have so acted wilfully and unlawfully in destroying or damaging the alleged property. Thus this major ingredient must be proved before the accused is convicted of the offence leave alone proof of ownership and damage or destruction of the disputed property. This position of the law was clearly stated in the case of **Lawrence Mateso Vs. R** (1996) TLR 118 where this court when discussing as to what constitutes the offence of malicious damage to property which position I subscribe to, had this to say:

> ***"Before a person is convicted of that offence, malice, inter alia, must be admitted or proved.*** *But the word mallce here is not used in the sense understood by the layman; it is used in a technical sense. Here the word does not necessarily mean personal spite against the owner or possessor of the damaged property. It is enough if the accused intended wrongful damage to the property, because if that intention is admitted or demonstrated to have existed, the law will presume*

malice. The presumption is, of course, rebuttable." (emphasis supplied)

The Court went on to state that:

> *"It follows from all this that a bona fide assertion of right-whether or not the belief was founded in law-is, putting it in general terms, a sufficient defence to a charge of malicious damage to property. The decisiveness does not lie in the lawfulness of what the accused did but in the question whether the accused believed he was entitled to do what he did. The accused's belief need not be a reasonable one, for the unreasonableness of the belief is a matter which goes only to credibility. The unreasonableness of the alleged belief may be so great as to lead, when considered with other factors to an irresistible conclusion that the accused could not have acted bona fide when he damaged the property in question.* ***But where it is accepted (or where there is a reasonable doubt on the matter) that the accused damaged the property under the honest but mistaken belief that the said property was his or that he had a right to do what he did to it he has not committed the offence of malicious damage to property.***" (emphasis supplied)

Applying the principle stated above in the case at hand, it is not in dispute that, when the charge was read over to him, the appellant denied the offence. Thus he never admitted the ingredient of malice nor was it

established and proved by the respondent. The Appellate Court when entertaining and determining the third ground of appeal on failure of the trial court to analyse the prosecution evidence, ought to have considered and determined the issue whether this important ingredient of malice was proved by the respondent before dismissing the appellant's appeal. Unfortunately it gave a general conclusion on whether there was sufficient evidence to prove the case by merely stating that, it was pleased the evidence was well analysed by the trial court and therefore sufficient enough to prove the respondent's case, thus found the ground have no merit.

As the appellate court failed to evaluate and analyse the trial court evidence which act prejudiced the appellant, this court finds itself constrained to so do despite of being the second appellate court, as the first appellate court failed to so act. Having gone through the trial court proceedings, the evidence adduced by the respondent and his witnesses as well as the judgment it is not in dispute that the respondent's property was destroyed by the appellant. The only dispute is whether the destruction was wilfully and unlawfully done, that means with *"malice"*. It is in record that ownership of disputed paddy field (land) was once determined by the Mkindo Land Ward Tribunal in Land Cause No. 23 of 2017 by allowing both parties to utilise their land as per the demarcations shown by them. The said decision was tendered and admitted in court as Exh. "A". Unfortunately the Land Ward Tribunal judgment does not bear the sketch map to show the disputed land for this court to satisfy itself of the exact area which the appellant is alleged to have ploughed and damaged respondent's property. In his defence the appellant when cross-examined stated that, the paddy field

(land) he ploughed belonged to him and not the respondent. To let him speak loud I quite part of his evidence:

Xxd SM1:

-Nimelima kwenye eneo langu la shamba langu siyo lako.

Wewe ulimwaga mbegu kinyume na taratibu za sheria.

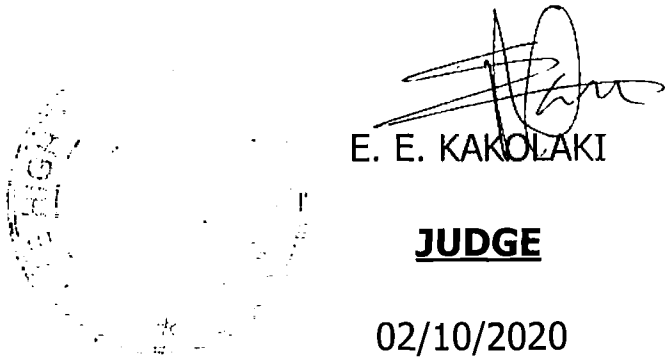
What is gleaned from the appellant's defence is clear and this Court has no doubt in concluding that when ploughing the paddy field he had a honest believe that the said property was his or that he had a right to do what he did on it, thus the ingredient of malice was not proved as there is no evidence to prove otherwise. It is from that conclusion coupled with the position in the case of **Lawrence Mateso** (supra), I am in agreement with the appellant's submission and therefore of the holding that, the offence of Malicious Damage to Property was not proved beyond reasonable doubt against the appellant. Thus the fifth ground has merit.

This ground having the effect of disposing the appeal, I see no reason to consider and determine the rest of the grounds of appeal as doing so will amount to academic exercise which I am not prepared at the moment to venture into.

In consequences, I would hold as I hereby do that, this appeal has merit and is hereby allowed. I proceed to quash the decision of the appellate court and the conviction entered by the trial court. I further set aside the sentence and compensation order meted on the appellant by the trial court.

It is so ordered.

DATED at DAR ES SALAAM this 02nd day of October, 2020.



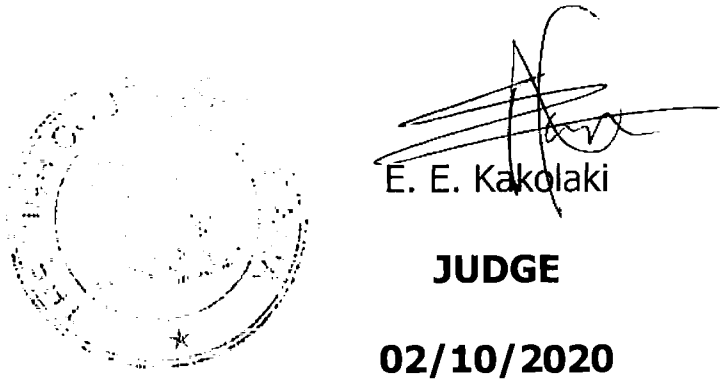
E. E. KAKOLAKI

JUDGE

02/10/2020

Delivered at Dar es Salaam this 02nd day of October, 2020 in the presence of the Appellant, the respondent and Ms. Monica Msuya, court clerk.

Right of appeal is explained.



E. E. Kakolaki

JUDGE

02/10/2020